

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOAQUIN MURRIETTA
MARTINEZ,

Plaintiff,

v.

BEARD,

Defendant.

Civil No. 13-CV-1457-BTM (WVG)

ORDER DENYING PETITIONER'S
MOTION TO APPOINT COUNSEL

[DOC. NO. 49]

I. BACKGROUND

On June 24, 2013, Petitioner filed a Petition for Writ of Habeas Corpus. (Doc. No. 1.) On July 8, 2013, Petitioner's case was dismissed without prejudice because he failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to allege exhaustion of state court remedies. (Doc. No. 2.) On August 19, 2013, Petitioner filed a First Amended Petition for Writ of Habeas Corpus. (Doc. No. 3.) On December 27, 2013, Respondent filed an Answer. (Doc. No. 21.) On May 20, 2014, this Court issued a Report and Recommendation ("R&R") which recommended that the Petition be dismissed without prejudice to Petitioner refiling a future petition which contained only exhausted claims. (Doc. No. 33.) On August 19, 2014, Petitioner filed a Motion to Amend the First Amended Petition and a Motion for Stay and Abeyance. (Doc. Nos. 37, 39.)

1 On October 16, 2014, the Honorable Barry Ted Moskowitz, United States District
2 Judge, issued an Order Declining to Adopt the R&R. (Doc. No. 40.) In his Order, the
3 District Judge stated that this Court failed to address Respondent's contention that claims
4 three and four of the Petition should be denied as meritless notwithstanding Petitioner's
5 failure to present them to the state supreme court. Id. at 3. The District Judge also
6 concluded that this Court failed to address whether the claims which were not presented to
7 the state supreme court should be considered technically exhausted. Id.

8 On December 1, 2014, Petitioner filed a Notice of Assisting Petitioner; Declaration
9 of Anthony Ivan Bobadilla. (Doc. No. 45.) In the Declaration, Mr. Bobadilla notified the
10 Court that he was an inmate assisting Petitioner with his First Amended Petition. Id. On
11 December 8, 2014, the District Judge issued an Order Denying Petitioner's Request for
12 Relief related to Mr. Bobadilla. (Doc. No. 46.) In its Order, the Court noted that it received
13 a Notice of Assisting Petitioner and Prayer for Relief filed by Mr. Bobadilla, a person
14 currently incarcerated with Petitioner. Id. at 1. The Court noted that, to the extent Mr.
15 Bobadilla was requesting appointment of "next friend" status to assist Petitioner in this
16 action, his request was denied. Id. at 2. The Court also denied a request for an order
17 directing that Mr. Bobadilla and/or Petitioner not be transferred to another institution while
18 Petitioner's action was pending.

19 On December 30, 2014, the District Judge issued an Order Granting Petitioner's
20 Unopposed Motion to Amend the Petition and Denying Petitioner's Motion for Stay and
21 Abeyance as Moot. (Doc. No. 50.) The Court noted that Petitioner filed a Motion to Amend
22 the First Amended Petition to present additional claims. Id. at 1-2; citing Doc. No. 37. The
23 Court also noted that Petitioner filed a Motion for Stay and Abeyance in which he requested
24 the Court hold the First Amended Petition in abeyance while he returned to state court to
25 exhaust state court remedies as to the new claims, and as to the ineffective assistance of trial
26 counsel claim raised in the First Amended Petition. Id. at 2; citing Doc. No. 39. In order to
27 avoid the delay in requiring Petitioner to file a Second Amended Petition which presented
28 all claims in a single pleading, the District Judge consolidated the First Amended Petition

1 with the habeas petition which constituted Petitioner's Motion to Amend (Doc. No. 37), and
 2 ordered that, together, they formed the operative pleading in this action. (Doc. No. 50 at 2.)
 3 The Court denied Petitioner's Motion for Stay and Abeyance as moot because the new
 4 claims were technically exhausted and procedurally defaulted due to Petitioner's failure to
 5 present them to the state court in a timely, procedurally proper manner. Id.

6 **II. MOTIONS TO APPOINT COUNSEL**

7 **A. PRIOR MOTIONS TO APPOINT COUNSEL**

8 On October 22, 2013, the Court received a letter from Petitioner requesting that an
 9 attorney be appointed for him. (Doc. No. 8.) The Court construed the letter to be a Motion
 10 for Appointment of Counsel, and on October 24, 2013, this Court issued an Order Denying
 11 Motion for Appointment of Counsel. (Doc. No. 9.) On October 30, 2013, the Court received
 12 an undated letter from Petitioner which again requested appointment of counsel. (Doc. No.
 13 13.) In the October 30, 2013 letter, Petitioner stated that he had a stroke and needed "more
 14 time." Id.

15 On October 31, 2013, the Court ordered Respondent to submit for an *in camera*
 16 review, Petitioner's medical records at the prison at which he was housed and any other
 17 evidence in the files at the prison that showed Petitioner's medical condition(s) and his
 18 ability to represent himself in this action. (Doc. No. 14.) On November 21, 2013, the Court
 19 received Petitioner's medical records dated from March 27, 2012 to November 5, 2013.
 20 These documents included medical records from Donovan State Prison and the San Diego
 21 Sheriff's Department. The Court did not receive any records dated prior to March 27, 2012.
 22 The Court conducted an *in camera* review of Petitioner's medical records.

23 On November 25, 2013, this Court issued a second Order Denying Petitioner's
 24 Application for Appointment of Counsel. (Doc. No. 15.) The Court stated that its review
 25 of Petitioner's medical records did not support his renewed request for appointment of
 26 counsel. Id. at 3. The Court found that Petitioner suffered from psychological problems,
 27 took medications to treat his psychological problems, and could manage his psychological
 28 problems if he took his medications. Id. at 2. The Court also noted that Petitioner could

1 communicate in English, was generally alert and cooperative, and his thought processes were
 2 organized, linear, logical, and goal-directed. Id. at 2-3. After a review of his medical
 3 records, the Court observed that Petitioner aggressively sought the medications he believed
 4 to be best for him by repeatedly requesting those medications from prison psychiatrists, and
 5 by filing prison grievances when he did not receive those medications. Id. at 3. The Court
 6 stated that, in July of 2012, Petitioner engaged in a hunger strike because he did not receive
 7 the medications he deemed best for him, and he refused consultations with prison
 8 psychiatrists after those psychiatrists did not prescribe medications Petitioner deemed best
 9 for him. Id.

10 The Court found that Petitioner's medical records showed that he did not suffer a
 11 stroke, at least not after March 27, 2012. (Doc. No. 15 at 3.) The Court noted that, even if
 12 Plaintiff suffered a stroke before March 27, 2012, his medical records amply demonstrated
 13 that he was quite capable of forming opinions about his health care, and obtaining the health
 14 care he needed while in prison. Id. The Court observed that the medical records indicated
 15 that Petitioner had used many avenues to obtain what he needed or believed he needed. Id.
 16 The Court concluded that for the reasons stated in its first Order denying Petitioner's motion
 17 for appointment of counsel, and based on the Court's review of his medical records,
 18 Petitioner had not demonstrated that he required counsel to represent him in this action. Id.
 19 at 3-4. Therefore, the Court denied Petitioner's renewed Motion for Appointment of
 20 Counsel. Id. at 4.

21 **B. INSTANT MOTION TO APPOINT COUNSEL**

22 On December 18, 2014, Petitioner filed a third Motion to Appoint Counsel. (Doc. No.
 23 49.) The District Judge accepted Petitioner's Motion to Appoint Counsel through a
 24 discrepancy order on December 18, 2014, directing that the motion be filed nunc pro tunc
 25 to the date received in the Clerk's Office. On April 27, 2015, the Motion was assigned to
 26 the undersigned. In his instant Motion, Petitioner asserts that he does not have the financial
 27 resources to retain counsel, and he is in no position to investigate crucial facts. (Doc. No.
 28 49 at 1-2, 24.) He argues that his case involves substantial and complex procedural legal or

1 mixed legal and factual questions, and that he has no comprehension of federal habeas
 2 corpus procedures. Id. at 4. He also claims that the case will require the assistance of
 3 experts in framing and proving the claims. Id. at 23. Petitioner claims that he has had
 4 another inmate assisting him with his Court filings, but notes that the inmate helping him has
 5 no experience with federal habeas corpus petitions, and either Petitioner or the assisting
 6 inmate may be moved at any time. Id. at 4-5.

7 Petitioner also claims that he lacks education and is mentally impaired/disabled. (Doc.
 8 No. 49 at 9.) He states that he is currently an inmate in the Mental Health Services Delivery
 9 System and has a qualifying mental disorder. Id. at 9. He refers the Court to Exhibit B,
 10 California Department of Corrections and Rehabilitation (“CDCR”) form 128MH3, and
 11 claims that the form confirms his qualifying medical disorder. Id. Petitioner claims that the
 12 CDCR form notes that “Petitioner ‘revealed a potential effective communication trigger
 13 (TABE reading score of 2.3) that requires...assistance for reading or writing or any other
 14 accommodation for a possible learning disability...’” Id.

15 **III. APPLICABLE LAW AND DISCUSSION**

16 The Sixth Amendment right to counsel does not extend to federal habeas corpus
 17 actions by state prisoners. McCleskey v. Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis,
 18 801 F.2d 1191, 1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir.
 19 1986). However, financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C.
 20 § 2254 may obtain representation whenever the court “determines that the interests of justice
 21 so require.” 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 2005); Terrovona v. Kincheloe, 912
 22 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984);
 23 Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994).

24 The interests of justice require appointment of counsel when the court conducts an
 25 evidentiary hearing on the petition. Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728;
 26 Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994); Rule 8(c), 28 U.S.C. foll. § 2254. The
 27 appointment of counsel is discretionary when no evidentiary hearing is necessary.
 28 Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Abdullah, 18 F.3d at 573.

1 In the Ninth Circuit, “[i]ndigent state prisoners applying for habeas relief are not
 2 entitled to appointed counsel unless the circumstances of a particular case indicate that
 3 appointed counsel is necessary to prevent due process violations.” Chaney, 801 F.2d at
 4 1196; Knaubert, 791 F.2d at 728-29. A due process violation may occur in the absence of
 5 counsel if the issues involved are too complex for the petitioner. In addition, the
 6 appointment of counsel may be necessary if the petitioner has such limited education that he
 7 or she is incapable of presenting his or her claims. Hawkins v. Bennett, 423 F.2d 948, 950
 8 (8th Cir. 1970).

9 In the Eighth Circuit, “[t]o determine whether appointment of counsel is required for
 10 habeas petitioners with nonfrivolous claims, a district court should consider the legal
 11 complexity of the case, the factual complexity of the case, the petitioner’s ability to
 12 investigate and present his claim, and any other relevant factors.” Abdullah, 18 F.3d at 573
 13 (citing Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990)); Hoggard, 29 F.3d at 471;
 14 Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993); Smith v. Groose, 998 F.2d 1439, 1442 (8th
 15 Cir. 1993); Johnson v. Williams, 788 F.2d 1319, 1322-23 (8th Cir. 1986).

16 Because these factors are useful in determining whether due process requires the
 17 appointment of counsel, they are considered to the extent possible based on the record before
 18 the Court. Here, Petitioner has sufficiently represented himself to date. From the face of the
 19 Petition, filed *pro se*, it appears that Petitioner has a good grasp of this case and the legal
 20 issues involved. Under such circumstances, a district court does not abuse its discretion in
 21 denying a state prisoner’s request for appointment of counsel as it is simply not warranted
 22 by the interests of justice. See LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987).

23 Further, while Petitioner claims that he lacks education and is mentally im-
 24 paired/disabled, the documents attached to his Motion to Appoint Counsel do not support
 25 granting Petitioner’s Motion. Petitioner attaches two CDCR 128-MH3 forms, titled State
 26 of California Mental Health Placement Chrono. (Doc. No. 49 at 11-12.) The forms, dated
 27 October 1 and 23, 2014, indicate that Petitioner has a qualifying mental disorder, but do not
 28 specify any details of the disorder. Id. Petitioner also attaches a First Level Appeal

1 Response from Mule State Creek Prison dated November 24, 2014, and a Second Level
2 Appeal Response dated December 1, 2014. Id. at 16-19. Petitioner submitted the first level
3 appeal seeking a document that certified that he was disabled, along with a description of his
4 disability. Id. at 18. The First Level Appeal Response indicates that Petitioner participated
5 in a face-to-face interview with a Supervisor of Academic Instruction on November 20,
6 2014. Id. The Response noted that, while Petitioner does have medical records that indicate
7 that he has medical issues, a review of the education files did not reveal any documentation
8 of a verifiable learning disability. Id. The first level appeal was partially granted in that
9 accommodations would be provided for Petitioner's physical disability if he requested
10 assistance, and Petitioner could request staff assistance with reading and writing. Id. at 18-
11 19. In the second level appeal, Petitioner again sought a document that certified he was
12 disabled, along with a description of his disability. Id. at 16. The Second Level Appeal
13 Response indicates that the prison is not required to test for learning disabilities, as it is not
14 necessary to verify a learning disability in order to accommodate the associated limitations.
15 Id. at 17. The second level appeal was also partially granted in that Petitioner could request
16 staff assistance with reading or writing or any other accommodation for a possible learning
17 disability, and referenced his current CDCR 128-MH3 form showing his level of mental
18 health care. Id. at 17. At both levels of appeal, the prison stated that it could not provide
19 Petitioner with a document verifying a learning disability at that time. Id. at 17, 19.

20 This Court has already conducted an *in camera* review of Petitioner's medical records
21 from March 27, 2012 to November 5, 2013, and determined that there was nothing in the
22 records to merit a granting of his previous Motion to Appoint Counsel. The Court has not
23 been presented with any additional evidence to support appointing counsel. At this stage of
24 the proceedings, the Court finds that the interests of justice do not require the appointment
25 of counsel.

26 The Court also notes that "[w]here the issues involved can be properly resolved on the
27 basis of the state court record, a district court does not abuse its discretion in denying a
28 request for court-appointed counsel." Hoggard, 29 F.3d at 471; McCann v. Armontrout, 973

1 F.2d 655, 661 (8th Cir. 1992); Travis v. Lockhart, 787 F.2d 409, 411 (8th Cir. 1986) (per
 2 curiam) (holding that district court did not abuse its discretion in denying Section 2254
 3 habeas petitioner's motion for appointment of counsel where allegations were properly
 4 resolved on basis of state court record). Here, Petitioner asserts that certain statements were
 5 admissible under an exception to the California hearsay rule, and that his federal constitu-
 6 tional right to a fair trial was violated. See Doc. No. 3. Petitioner also argues that he was
 7 compelled to testify against himself when a videotaped statement he made to the police was
 8 shown to the jury and because he was forced to take the stand at trial to respond to that
 9 statement, his appellate counsel was ineffective for failing to argue he was compelled to
 10 testify against himself, his trial counsel was ineffective for failing to present evidence of his
 11 medical condition, that there was improper admission of hearsay statements, and arbitrary
 12 and discriminatory prosecution. See Doc. No. 37. Respondent has provided the Court with
 13 the Clerk's Transcript (two volumes), the Reporter's Transcript (fourteen volumes),
 14 Appellant's Opening Brief, Respondents' Opening Brief, the Opinion of the California Court
 15 of Appeal, the Petition for Review, and the Order of the Supreme Court of California. See
 16 Doc. No. 22. At this stage of the proceedings, it appears the Court will be able to properly
 17 resolve the issues involved on the basis of the state court record.

18 "The procedures employed by the federal courts are highly protective of a *pro se*
 19 petitioner's rights. The district court is required to construe a *pro se* petition more liberally
 20 than it would construe a petition drafted by counsel." Knaubert, 791 F.2d at 729 (citing
 21 Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding *pro se* complaint to less stringent
 22 standard) (per curiam)); Bashor, 730 F.2d at 1234. The Petition in this case was pleaded
 23 sufficiently to warrant this Court's order directing Respondent to file an answer or other
 24 responsive pleading to the Petition.

25 On December 13, 2014, Judge Moskowitz granted Petitioner's Motion to Amend the
 26 Petition, and Ordered that Respondents file an Answer by March 2, 2015. (Doc. No. 50 at
 27 4.) The Court ordered that Petitioner may file a Traverse by April 2, 2015. Id. On March
 28 6, 2015, the undersigned granted in part and denied in part Respondents' Application for

1 Enlargement of Time to File an Answer. (Doc. No. 58.) The Court ordered that Respon-
 2 dents file an Answer by March 18, 2015, and that Petitioner may file a Traverse by April 20,
 3 2015. Id. at 2. To date, Petitioner has not filed a Traverse. Accordingly, because further
 4 briefing is not required of Petitioner, his claim that he is at a disadvantage in responding and
 5 thus needs counsel is without merit.

6 “The district court must scrutinize the state court record independently to determine
 7 whether the state court procedures and findings were sufficient.” Knaubert, 791 F.2d at 729;
 8 Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir.1985); Rhinehart v. Gunn, 598 F.2d 557,
 9 558 (9th Cir.1979) (per curiam); Turner v. Chavez, 586 F.2d 111, 112 (9th Cir.1978) (per
 10 curiam). Even when the district court accepts a state court’s factual findings, it must render
 11 an independent legal conclusion regarding the legality of a petitioner’s incarceration. Miller
 12 v. Fenton, 474 U.S. 104, 112 (1985). The district court’s legal conclusion, moreover, will
 13 receive de novo appellate review. Hayes v. Kincheloe, 784 F.2d 1434, 1436 (9th Cir. 1986).

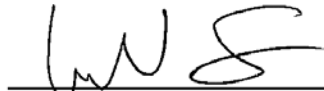
14 The assistance counsel provides is valuable. “An attorney may narrow the issues and
 15 elicit relevant information from his or her client. An attorney may highlight the record and
 16 present to the court a reasoned analysis of the controlling law.” Knaubert, 791 F.2d at 729.
 17 However, as the court in Knaubert noted: “unless an evidentiary hearing is held, an
 18 attorney’s skill in developing and presenting new evidence is largely superfluous; the district
 19 court is entitled to rely on the state court record alone.” Id. (citing Sumner v. Mata, 449
 20 U.S. 539, 545-57 (1981), and 28 U.S.C. § 2254(d)). Because this Court denies Petitioner’s
 21 motion for appointment of counsel, it must “review the record and render an independent
 22 legal conclusion.” Id. Moreover, because the Court does not appoint counsel, it must
 23 “inform itself of the relevant law. Therefore, the additional assistance provided by attorneys,
 24 while significant, is not compelling.” Id. (emphasis in original).

25 If an evidentiary hearing is required, Rule 8(c) of the Rules Governing Section 2254
 26 Cases requires that counsel be appointed to a petitioner who qualifies under 18 U.S.C. §
 27 3006A(a)(2)(B). Rule 8(c), 28 U.S.C. foll. § 2254; see Wood v. Wainwright, 597 F.2d 1054
 28 (5th Cir. 1979). In addition, the Court may appoint counsel for the effective utilization of

1 any discovery process. Rule 6(a), 28 U.S.C. foll. § 2254. For the above-stated reasons, the
2 “interests of justice” in this matter do not compel the appointment of counsel. Accordingly,
3 Petitioner’s request for appointment of counsel is DENIED without prejudice.

4 IT IS SO ORDERED.

5 DATED: May 19, 2015

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9 Hon. William V. Gallo
10 U.S. Magistrate Judge
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